UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Joseph J. O'CONNELL 008075

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2465

Joseph J. O'CONNELL

This appeal has been taken in accordance with 46 U.S.C. SS7702 and 46 CFR Part 5, Subpart J.

By order of 11 February 1987, an Administrative Law Judge of the United States Coast Guard at Tampa, Florida, suspended Appellant's license outright for four months, plus nine months remitted on twelve months probation, upon finding proved the charge of negligence. He also suspended Appellant's license outright for an additional two months for violating a previous order of suspension on probation. The specification found proved alleges that Appellant did, while serving as pilot aboard the M/V SEAFARER under the authority of the captioned license, on or about 19 August 1985, while the vessel was assisting the T/B OCEAN 255 inbound in Tampa Bay, fail toperform his duty to direct and control the vessel as required, in that he failed adequately or prudently to navigate the vessel resulting in the grounding of the tank barge OCEAN 255 in the vicinity of Buoy 11J, Tampa Bay, Florida.

The hearing was held at Tampa, Florida, on 11 February 1987. Appellant was present at the hearing, and was not represented by counsel. He denied the charge and specification.

The Investigating Officer introduced in evidence the testimony of one witness, and also introduced twelve exhibits.

Appellant introduced the testimony of the Investigating Officer and one other witness, and made voluntary, unsworn statements concerning the facts of the incident throughout the proceeding.

The complete Decision and Order of the Administrative Law Judge

was issued at Jacksonville, Florida, on 23 February 1987. Appeal was timely filed on 5 March 1987, and was perfected on 21 April 1987.

FINDINGS OF FACT

At all relevant times, Appellant was acting under the authority of the captioned documents as pilot of the flotilla made up of the SEAFARER and the OCEAN 255.

The SEAFARER is a 122 foot, 179 gross ton tug. The OCEAN 255 is a 546 foot, 14,697 ton ank barge. During the events giving rise to this proceeding, the barge was carrying over 256,000 barrels of jet fuel and gasoline from Corpus Christi, Texas, to Tampa, Florida. The barge had a draft of just over thirty-two feet. The SEAFARER was made up in the notch, pushing the barge.

On the morning of 19 August 1986 the flotilla arrived at Tampa Bay. At 1:45 p.m. Appellant boarded the SEAFARER to serve as pilot of the flotilla for the transit through Tampa Bay to Port Tampa. The flotilla for the transit through Tampa Bay to Port Tampa. The flotilla proceeded to Gadsden Anchorage and anchored, waiting for appropriate tidal current conditions to continue on to Port Tampa. The plan was to arrive at the dock at the time of low water slack to ease docking maneuvers.

At 9:50 p.m. the tugs TAMPA and EDNA arrived to serve as assist tugs for the transit to Port Tampa. At 10:00 p.m. the flotilla got underway. The assist tugs were not made up to the barge; they ran alongside, one on each side. The weather at the time was clear; visibility was not a factor in the transit. The winds were from the south at 15 knots. There were not mechanical problems with the tug or tow. Charles Chapman, Captain of the SEAFARER, was on watch as operator and helmsman.

The flotilla proceeded up Cut "G" Channel, on an inbound course of almost due west. To get to Port Tampa, the flotilla had to make a turn to starboard of nearly ninety degrees from Cut "G" Channel into Cut "J" Channel. The depth of the channel at the turn is approximately 34 feet. The depth of the surrounding waters of Tampa Bay, adjacent to the channel, is marked on the official chart as 14 feet. When the flotilla arrived at the turn point, the tidal current was ebbing in a south-southwesterly direction, pushing against the starboard side of the flotilla, with a speed of about one knot.

In order to make the turn, Captain Chapman, on his own

initiative, put his rudder hard over to starboard and increased his speed. At the same time, Appellant was watching the ranges in the channel. Appellant gave no helm or throttle commands at any time just prior to the turn, during the turn, and up to and including the moment of grounding. During the turn, it became apparent to Captain Chapman that the flotilla was not turning rapidly enough to stay in the channel. Captain Chapman, without direction from Appellant, ordered the assist tug TAMPA, running alongside his port bow, to push the flotilla to starboard. The TAMPA did make contact with the barge and attempted to push it around, but had resumed his position running alongside the port bow at the time of the grounding. Captain Chapman put the SEAFARER's engines astern. At 10:45 p.m., the barge OCEAN 255 grounded just outside the west edge of Cut "J" Channel in the vicinity of Buoy 11J (formerly 9J).

The barge remained aground until 12:30 a.m. on 20 August, a total of one hour and forty-five minutes. At that time it was refloated, and returned to Gadsden Anchorage to await favorable tide and current conditions again. At 4:15 a.m. the flotilla again got underway, and proceeded to Port Tampa without incident. Appellant continued to serve as pilot of the flotilla throughout the perod. Later inspection of the barge revealed minor scraping of paint, but no other damage was caused by the grounding.

I find that the Administrative Law Judge's Finding of Fact No. 12, Decision and Order at p. 7, is not supported by any evidence in the record, and will not adopt the finding on appeal.

BASES OF APPEAL

Appellant makes the following contentions on appeal:

(1) The imposition of a two month outright suspension for the violation of a prior probation order was an illegal order and must be reversed.

(2) The Coast Guard failed to carry its burden of proof because the presumption of negligence that arose from the grounding was rebutted by the testimony of Appellant and Captain Chapman that the grounding was unavoidable due to unpredictable sheer.

(3) The order imposed by the Administrative Law Judge was unduly severe.

Appearance: Edward F. Gerace, Esq., 315 Madison Street, Suite

711, Tampa, Florida, 33602-4816.

OPINION

I

Appellant contends that the imposition of a two month outright suspension for the violation of the prior probation order was an illegal order and must be reversed. I agree.

This incident was not a violation of the probation in question by the Appellant. The two months of suspension on probation was ordered on 31 December 1986 for an act of negligence which occurred on 9 October 1986. The probation could only be violated for acts which occurred during the period of probation, not which were proved against Appellant during that time. The acts involved in this case occurred on 19 August 1986; the probation did not start until 31 December 1986 at the earliest. The probation was not violated by the acts involved in this case, and therefore the suspension was invalid.

II

Appellant contends that the Coast Guard failed to carry its burden of proof because he rebutted the presumption of negligence that arose from the grounding by the testimony of Captain Chapman that the grounding was unavoidable due to unpredictable sheer. I do not agree.

A

PRESUMPTION OF NEGLIGENCE

The grounding of a vessel on a marked shoal or where a vessel has no business being raises a presumption of negligence on the part of the person directing the navigation of the vessel. Appeal Decision 2382 (NILSEN), aff'd. sub nom. Commandant v. Nilsen, NTSB Order No. EM 126.

The flotilla in this case needed to stay in the channel because of its draft. (Transcript at pp. 41-42). The flotilla's draft was about 32 feet at the time of the grounding. (Transcript at p. 41). The depth of the channel from Cut "G" into Cut "J" where the flotilla grounded was about 34 feet. (Transcript at p. 42; I.O.'s Exhibit 12). The depth of the surrounding water of Tampa Bay adjacent to the channel where the grounding took place was about 14 feet as published on the official chart of the area. (I.O.'s Exhibit 12). From prior

experience, Appellant was aware that the draft of the flotilla confined its navigation to the marked, dredged channels of Tampa Bay. (Transcript at pp. 32-33). Since the flotilla grounded outside the marked channel, the presumption of negligence on the part of Appellant arose. (Transcript at p. 48). The application of the presumption is in accordance with the holding of the court in the suspension and revocation case of Woods v. United States, 681 F.2d 988 (5th Cir. 1982):

"When a moving vessel collides with a fixed object there is a presumption that the moving vessel is at fault, and this presumption suffices to make out a prima facie case of negligence...against all parties participating in the management of the vessel at the time of contact."

The reasoning and policy underlying this presumption are clear. Vessels under careful and prudent navigation do not run aground in the ordinary course of things. Appeal Decisions 2173 (PIERCE), aff'd. sub nom., Commandant v. Pierce, NTSB Order No. EM 81; and Appeal Decision 1891 (BLANK). In addition, any evidence of actual negligence, or the lack of it, is likely to be known only to the persons on board, who are in the best position to either keep damaging evidence hidden, or bring favorable evidence forward.

The presumption of negligence is strong; in order to successfully rebut the presumption, Appellant was required to show that he did all that reasonable care and skill requires of a ship's pilot. Again, this rule comes from the Fifth Circuit case of Woods, supra, at 990, a case specifically dealing with an appellant's burden in rebutting the presumption in suspension and revocation hearings such as this:

"The burden of disproof of fault by the moving vessel requires demonstration that its operator did all that reasonable care required. Brown and Root Operators, Inc. v. Zapata Off-shore Co., 377 F.2d 724, 726 (5th Cir. 1967)"

See also Appeal Decisions 2404 (McALLISTER), aff'd. sub nom., Commandant v. McAllister, NTSB Order No. EM 131; Appeal Decisions 2173 (PIERCE), aff'd. sub nom., Commandant v. Pierce, NTSB Order No. EM 81; 2174 (TINGLEY), aff'd. sub nom., Commandant v. Tingley, NTSB Order No. EM 6, aff'd. mem. sub nom., Tingley v. United States, 688 F.2d 848 (9th Cir. 1982). Speculative possibilities are not sufficient to rebut the presumption. Appeal Decision 2174 (Tingley), supra.

Appellant contends that he rebutted the presumption of negligence by introducing evidence that a sheer1 occurred. This does not excuse Appellant, however, as "[t]he mere fact that a sheer occurred does not excuse a navigator unless he can show that it occurred without any fault or negligence on his own part . . .." Seaboard Airline R. Co. v. Pan American Petroleum & Transport Co. (The Pan Maryland), 199 F.2d 761,

1 "A ship will be set off the nearer bank when proceeding along a straight, narrow channel, especially if the draft of the ship is nearly equal to the depth of the water. This effect is particularly noticeable in narrow reaches with steep banks such as certain sections of the Panama Canal and is called bank cushion. As the ship moves ahead, the wedge of water between the bow and the nearer bank builds up higher than that on the other side, and the bow is forced out sharply. The suction of the screw, especially with a twin-screw ship, and the unbalanced pressure of water on the [ship's] quarter lower the level of the water between the [ship's] quarter and the near bank and force the stern toward the bank. This is called bank suction. The combined effect of bank cushion and bank suction may cause the ship to take a sudden and decided sheer toward the opposite bank. [These factors will] affect a ship trying to turn in a sharp bend in a narrow channel. Both are strong when the bank of the channel is steep[.]" A. . Knight, Modern Seamanship, pp. 197-199, (14th ed. 1966.)

1952 A.M.C. 1934 (5th Cir. 1952). The cause of the sheer in this case was claimed to be bank or bottom suction resulting from maneuvering a deep-draft vessel in a narrow channel. (Transcript at p. 52). The court in Transorient Navigators Company S/A v. M/S Southwind, et al, 524 F. Supp. 373 (EDLA 1981), found:

"[S]hearing caused by the proximity of a vessel to a bank is a well known phenomenon that navigators and pilots should generally be aware of...Indeed, the annals of maritime law are replete with instances of what is referred to as bank sheer or suction."

Another court in The Manhattan, 3 F. Supp. 75 (EDPA 1932), noted with respect to a sheer:

"[T]he only general rule that can be laid down is that it should be foreseen and avoided."

It is well established that a pilot is expected to know channel conditions and be prepared to avoid or compensate for bank suction and

resulting sheer. The Supreme Court in 1874 first established the high standard of knowledge and experience expected of pilots in Atlee v. Packet Company, 88 US (21 Wall.) 389, 390, 22 L.Ed. 619 (1874):

"[A] pilot is selected for his personal knowledge of the topography through which he steers his vessel. He must know where the navigable channel is, in its relation to all those external objcts, especially in the night. He must also be familiar with all dangers that are permanently located in the course of the river, of sand-bars, snags, sunken rocks or trees, or abandoned vessels or barges. All this he must know and remember and avoid. To do this he must be constantly informed of changes in the current of the river, of sand-bars newly made, of logs and snags, or other objects newly presented against which his vessel might be injured." Id, at 396.

The Supreme Court did not impose this duty lightly, but looked to the responsibility vested in pilots:

"[When] we consider the value of the lives and property committed to their control, for in this they are absolute masters, the high compensation they receive, and the care which Congress has taken to secure by rigid frequent examinations and renewals of licenses, this very class of skill, we do not think we fix the standard too high." Id, at 397.

The same expectations regarding the level of expertise and responsibility of pilots is warranted today, if not more so because of the increases in technology and advances in the shipping industry. This was set forth in the holding in Transorient Navigators Company S/A v. M/S Southwind, et al, 524 F. Supp. 373 (EDLA 1981):

"[I]t is important to keep in mind that this is not a case of a 'weekend sailor' who happens to encounter a dangerous condition. The law places a special duty on the pilot of a vessel based on his expertise and the responsibilty he is charged with."

In Al Johnson Construction Co. v. S.S. Rio Orinoco, 249 F. Supp. 182, 1966 A.M.C. 791 (E.D. Pa. 1965), the court held:

"[The pilot] could readily have called for the assistance of the escorting tugs to counteract the anticipated bank suction while he was twenty minutes away from the scene of the collision. An experienced river pilot is presumed to know the prevailing channel conditions and is expected to be prepared for an emergency situation such as a severe degree of bank suction and resulting sheer which may confront him in

the course of his duties."

Therefore, as a pilot, Appellant is charged with knowledge of the currents and conditions in the area to be transited, and is obligated to take the necessary measures to counteract their effects on his vessel. See Appeal Decision 2380 (HALL) citing Davidson Steamship Co. v. United States, 205 U.S. 187, 194 (1907); Universe Tankships v. The Munger T. Ball, 157 F. Supp. 237 (S.D. Ala. 1957). The conditions must be such that they "could not have been foreseen by the exercise of the kind of judgment which good seamanship requires" in order to meet the burden of disproving negligence. Patterson Oil Terminals, Inc. v. The Port Covington, 109 F. Supp. 953 (E.D. Pa. 1952), aff'd, 208 F.2d 694 (3rd Cir. 1953); Appeal Decision 2366 (MONAGHAN). A pilot is held to a very high standard of care. See Woods v. United States, 681 F.2d 988 (5th Cir. 1982). He is expected to know, in addition to the channel conditions, tides, currents, and hazards to navigation of the waters in which he is licened as a pilot, the physical and handling characteristics of the vessel he is piloting. Appeal Decisions 2370 (LEWIS), 2367 (SPENCER), 2284 (BRAHN), and 995 (SAUNDERS).

An Appellant, faced with the presumption of negligence, must show that he acted prudently in the same manner expected of a reasonable pilot of the same experience, training, and local knowledge under the circumstances in order to successfully rebut the presumption. Woods v. United States, 681 F.2d 988 (5th Cir. 1982). The Appellant has asserted that either unavoidable, unpredictable sheer or, perhaps, helmsman error caused this allision.

The mere allegation of sheer does not save the Appellant. As has been pointed out, the very nature of Appellant's duties as a pilot is to recognize, anticipate and avoid the inherent, unique obstacles of the area for which he is experienced. Appeal Decision 456 (SEARS); Appeal Decision 2116 (BAGGETT); Appeal Decision 807 (DOEPFNER); Atlee, supra; Transorient, supra; Petition of M/V Elaine Jones, 480 F.2d 11 (5th Cir. 1973). The Appellant has been sailing the waters of Tampa Bay for seventeen years on all types of vessels, including those having similar maneuvering and draft restrictions to that of the flotilla in question. (Appellant's Brief at p.2). A sheer of the type described by Captain Chapman is a natural, foreseeable encounter whenever the draft of a vessel approaches the depth of the types of channels found in Tampa Bay, which have steep banks. (Transcript pp. 52, 53; I.O.'s Exhibit 12). Appellant's direct examination of LCDR Guyer indicates that Appellant knew what a sheer was and the consequences that could result from it. (Trnscript at p.

64). The issue with regard to the presumption of negligence in this case is the foreseeability of the sheer as a result of the combination of bank cushion and bank suction, not the predictability of when such forces may occur. Appellant, based on his experience in Tampa Bay with deep draft vessels, and his discussion with Captain Chapman concerning the tide, current and weather conditions, should have foreseen that a sheer was possible in the transit of Tampa Bay. The direct and cross examination of the only witness, Captain Chapman revealed no evidence of any practical actions taken by Appellant to counter its effects. Appeal Decision 449 (HITCHENS), Appeal Decision 448 (SILL). The proper weight to be given Captain Chapman's testimony in light of his bias and self-interest as master and helmsman of the flotilla at the time of the grounding is solely the province of the Administrative Law Judge. See United States v. Oregon State Medical Soc., 343 U.S. 326, 72 S. Ct. 690, 96 L. Ed. 978 (1952); Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333, 53 S. Ct. 391, 77 L. Ed. 819 (1933); Chesapeake & O R. Co. v. Martin, 283 U.S. 209, 51 S. Ct. 453, 75 L. Ed. 983 (1931); United States v. Caldwell, 820 F.2d 1395 (5th Cir 1987); United States v. Bales, 813 F.2d 1289 (4th Cir. 1987); Carter v. Duncan-Higgins, Ltd., 727 F.2d 1225 (D.C. Cir. 1984). Cf. Charles A. Grahn, Respondent, 3 N.T.S.B. 214 (Order EA-6, 1977); Appeal Decisions 2424 (CAVANAUGH), 2386 (LOUVIERE), 2340 (JAFFEE), 2333 (AYALA), 2302 (FRAPPIER), 2183 (FAIRALL), aff'd sub nom Hayes v. Fairall, N.T.S.B. Order No. EM 89 (1981), and 2116 (BAGGETT). Appellant elected, as is his right, not to testify. Appellant asserts that the grounding was unavoidable. However, there is no evidence t support this in the record, especially in the testimony of Captain Chapman. As was stated earlier, Appellant, who was watching the ranges astern, took no other action whatsoever to avoid the grounding since Captain Chapman was allowed to make all the critical decisions about the course and speed of the flotilla, the time and place to turn, (Transcript at pp. 46, 48-50, 58, 59), and when and where to use the tugs (Transcript at pp. 45, 50, 51).

With specific regard to the presumption, Appellant has failed to show that he acted reasonably under the circumstances. The Administrative Law Judge found that Appellant failed to rebut the presumption of negligence. (Decision and Order at p. 8). I have found no evidence to disturb that finding.

B

EVIDENCE OF NEGLIGENCE

The specification in question alleges that Appellant failed to perform his duty to direct and control the flotilla by adequately or prudently navigating the flotilla resulting in the grounding. Appellant, in styling this issue on appeal, overlooks the fact that there was independent evidence of negligence proving this specification presented at the hearing, in addition to the effect of the presumption raised by the grounding.

The record is very clear that Appellant took no action whatsoever to avoid the grounding because Appellant allowed Captain Chapman to make al the critical decisions about the course and speed of the flotilla (Transcript at pp. 46, 48-50, 58, 59), and when and where to use the tugs (Transcript at pp. 45, 50, 51).

Appellant discussed the tide conditions, the weather conditions and the current situation in Tampa Bay, while the flotilla was still at anchor, with Captain Chapman. (Transcript at p. 37). Appellant chose to bring the flotilla into Tampa Bay with an ebbing current and a falling tide. (Transcript at pp. 37, 38 45). Appellant knew he had to negotiate a 90 degree turn with a one knot ebbing current at low tide pushing toward the edge of the channel on which he eventually grounded. (Transcript at pp. 37, 38, 45, 61; I.O.'s Exhibit 12).

Appellant had the benefit of having two tugs running alongside, but not made up, which were immediately available to him for assistance. Appellant did not make any use of the tugs in anticipation of the 90 degree turn. (Transcript at p. 50). It was Captain Chapman who ordered a tug, the TAMPA, to push against the port bow after he began to experience some difficulty in making the turn into Cut "J". Captain Chapman testified that the tug complied with his order before the grounding occurred. (Transcript at pp. 46, 51). However, the Captain of the TAMPA indicated that at the time of the grounding he had resumed standing off the flotilla, running alongside. (I.O. Exhibit 4). Thus, what actions that were taken, effective or not, were not even taken by the Appellant.

Appellant raises on appeal the possibility of helmsman's error. Even assuming helmsman's error, Appellant, as the pilot, s responsible for the actions of those under his command. Appeal Decision 456 (SEARS). Appellant, himself, on direct examination of Captain Chapman, indicated that it was his normal practice as pilot, when working with Captain Chapman on the helm to allow Captain Chapman to make his own course and speed changes, reserving the ability to overrule a decision by Captain Chapman. (Transcript at pp. 58-59). This clearly places Appellant in an awkward position of allowing

someone with possibly less local knowledge to make critical decisions in confined areas of Tampa Bay. Appellant admits that prior to making the turn into Cut "J" that resulted in the grounding, his normal practice prevented him from giving an order to Captain Chapman, who had already increased speed and put his rudder over hard right to make what he felt was the proper combination of his throttle and rudder to successfully complete the turn. (Transcript at pp. 58, 59). Under these circumstances, it was negligent of Appellant to delegate the control of the vessel to Captain Chapman.

Not only did Appellant improperly delegate control of the movement of the flotilla to Captain Chapman, Appellant failed to give adequate direction to Captain Chapman according to the record. While Captain Chapman was attempting to make the turn from Cut "G" into Cut "J", Appellant was absorbed in watching the ranges astern. (Transcript at pp. 46, 70; I.O. Exhibit 12). Appellant states in his brief on appeal, "[Appellant] was required to execute a 90 degree turn from "G" cut into "J" cut, while monitoring his ranges aft because there are no inbound ranges at that point." (Appellant's Brief at p. 9). Furthermore, Appellant states in his brief:

"Perhaps Captain Chapman handled his helmsman's chores with celerity and dexterity, but perhaps he did not. [Appellant] was in no position to be able to tell - his eyes being diverted aft." (Brief at p. 9; Transcript at pp. 46, 70).

Appellant was not able to properly direct or control the flotilla at the time of the turn, because his attention was elsewhere. (Transcript at pp. 46, 70). The issue is not whether Captain Chapman's decisions were at fault, but rather whether Appellant's normal practice of allowing Captain Chapman to independently control the vessel's movements, subject to after the fact countermand, in combination with his attention being diverted to the ranges, amounted to negligence in navigating the flotilla. The Administrative Law Judge made such a finding. (Decision and Order at p. 5.) This evidence is independent of the reliance on the presumption of negligence.

C

CONCLUSIONS OF THE ADMINISTRATIVE LAW JUDGE

In conjunction with specific evidence of negligence, the Administrative Law Judge may draw all proper inferences from the fact that the barge grounded outside the channel. Appeal Decision 2307 (GABOURY); Appeal Decision 2116 (BAGGETT); Appeal Decision 1022 (JANSSENS); Appeal Decision 698 (LEMOINE); Appeal

Decision 394 (GALVAN). See Cleary, McCormick's Handbook of the Law of Evidence, 342, (2nd Ed., 1972). Considering evidence of negligence does not preclude consideration of the presumption of negligenc arising from an allision. Appeal Decision 2402 (POPE); see Tenneco Chemicals, Inc. v. William T. Burnett & Co., Inc., 691 F.2d 658 (C.A. Md. 1982); Traders & General Ins. Co. v. Powell, 177 F.2d 660, 665 (8th Cir. 1949); Smith v. Pacific Alaska Airways, 89 F.2d 253 (Cir. Ct. App. Ak. 1937), cert. denied, 302 U.S. 700, 58 S.Ct. 20, 82 L.Ed. 541 (1937). Cf. Commandant v. Oldow, NTSB Order EM 121 (1985), aff'd sub nom. Oldow v. National Transp. Safety Bd., 792 F.2d 144 (9th Cir. 1986); Panduit Corp. v. All States Plastic Mfg Co., 744 F.2d 1564, 1579 (Fed. Cir. 1984); Prokes v. Mathews, 559 F.2d 1057, 1060 (6th Cir. 1977); Legille v. Dann, 544 F.2d 1, 8-9, (D.C. Cir. 1976). The Administrative Law Judge found that the grounding raised a presumption of negligence which Appellant failed to rebut. Additionally, he found that Appellant was specifically negligent in the direction and control of the flotilla. The question of what weight is to be accorded to the evidence presented is for the Administrative Law Judge to determine. Appeal Decision 2398 (BRAZELL); Appeal Decision 2395 (LAMBERT); Appeal Decision 2386 (LOUVIERE); Appeal Decision 2282 (LITTLEFIELD). I will not reverse the conclusions of the Administrative Law Judge unless they are without support in the record, and inherently incredible, and I do not find so. Appeal Decisions 2424 (CAVANAUGH), 2423 (WESSELS), 2422 (GIBBONS), 2414 (HOLLOWELL), 2116 (BAGGETT).

III

Appellant contends that the order imposed by the Administrative Law Judge was unduly severe. I do not agree.

The order imposed upon finding a charge proved is solely within the discretion of the Administrative Law Judge, and should not be disturbed on appeal unless shown to be clearly excessive or an abuse of discretion. Appeal Decisions 2414 (HOLLOWELL), 2391 (STUMES), and 2313 (STAPLES). The order imposed by the Administrative Law Judge in this case is not clearly excessive or an abuse of discretion.

However, as discussed in section I of this opinion, it was error for the Administrative Law Judge to vacate the probation upon which two months of suspension had previously been ordered. For that reason, the order will be modified under my authority to modify orders on appeal. See 46 CFR 5.705(a).

I note that Appellant surrendered his license to begin serving the period of outright suspension ordered in this case on 13 February 1987. I issued an order granting Appellant a temporary license while this appeal was pending on 12 May 1987, therefore approximately three months of outright suspension have already been served. I also note that this incident was one of three in approximately five years in which vessels on which Appellant was serving as pilot ran aground.

CONCLUSION

Having reviewed the entire record and considered Appellant's arguments, I find that Appellant did not successfully rebut the presumption of negligence arising fom the grounding. Furthermore, apart from the presumption, I find that Appellant was negligent in failing to properly direct and control the proper navigation of the flotilla in making the turn from Cut "G" into Cut "J" in Tampa Bay. Appellant has not established sufficient cause to disturb the findings and conclusions of the Administrative Law Judge. The hearing was conducted in accordance with applicable law and regulations. However, the order must be modified.

ORDER

The findings and conclusions of the Administrative Law Judge dated at Tampa, Florida, on 11 February 1987 and Jacksonville, Florida, on 23 February 1987 are AFFIRMED. The order is hereby MODIFIED such that that part of the order providing for outright suspension for two (2) months based on the violation of previously ordered probation is VACATED. The order, as modified, is AFFIRMED.

J. C. IRWIN
Vice Admiral, U.S. Coast Guard
VICE COMMANDANT

Signed at Washington, D.C. this 10th day of May, 1988.

Even ifit is accepted that Appellant's evidence of sheer tended to rebut the presumption of negligence, it did not make the presumption disappear, as Appellant contends. This is the so-called "bursting bubble" theory of presumptions, which has come under much

criticism. Professor Morgan has said:

If a policy is strong enough to call a presumption into existence, it is hard to imagine it so weak as to be satisfied by the bare recital of words on the witness stand or the reception in evidence of a writing. And if the judicial desire for the result expressed in the presumption is buttressed by either the demand of procedural convenience or is in accord with the usual balance of probability, it is little short of ridiculous to allow so valuable a presumption to be destroyed by the introduction of evidence without actual persuasive effect.

Morgan, Instructing the Jury Upon Presumption and Burden of Proof , 47 Harv. L. Review 59, 82, quoted in 9 Wigmore, Evidence 2493c (Chadbourn Rev. 1981); See 1 Gard, Jones on Evidence 3:8 (6th ed. 1972).

Even if a presumption is rebutted, the underlying inference may still be relied upon. Wigmore states:

[A presumption] is based, in policy, upon the probative strength, as a matter of reasoning and inference, of the evidentiary fact; but the presumption is not the fact itself, but the legal consequence attached to it. But the legal consequence being removed, the inference, as a matter of reasoning, may still remain.

9 Wigmore, Evidence 2491 (Chadbourn Rev. 1981).

4. PROOF AND DEFENSES

.80.5 Negligence

presumption of, arising from grounding

.94 Presumptions

of negligence arising from grounding

7. NEGLIGENCE

.40 Grounding

outside channel

presumption of negligence arising from

.70 Negligence

presumption of, arising from grounding

.80 Presumptions

of negligence arising from grounding

.86 Sheer

no excuse to charge of negligence if unexplained

10. MASTERS, OFFICERS, SEAMEN

.38 Pilot

duty to know characteristics of vessel and waterway

11. NAVIGATION

.32 Grounding
outside channel

presumption of negligence arising from

.74 Pilots

duty to know characteristics of vessel and waterway

.81 Sheer

no excuse to charge of negligence if unexplained

13. APPEAL AND REVIEW

.04 Administrative Law Judge

order not modified unless obviously excessive

.60 Modification of ALJ's Order

modified if improper

not modified unless obviously excessive

Appeals Cited: 1891, 2424, 2423, 2422, 2414, 2402, 2404, 2307, 2313, 2386, 2340, 2333, 2302, 2391, 2366, 2380, 2382, 2386, 2395, 2398, 2370, 2367, 2288, 2282, 2284, 2174, 2173, 2183, 1891, 995, 394, 448, 449, 456, 698, 1022, 807, 2116

NTSB Orders cited: Commandant v. Tingley, NTSB Order No. EM 86; Commandant v. McAllister, NTSB Order No. EM 131; Commandant v. Pierce, NTSB Order No. EM 81; Commandant v. Nilsen, NTSB Order No. EM 126; Commandant v. Murphy, NTSB Order EM 139; Commandant v. Dougherty, NTSB Order EM 140; Charles A. Grahn, Respondent, 3 N.T.S.B. 214 (Order EA-6, 1977); Commandant v. Oldow, NTSB Order EM 121 (1985);

Cases Cited: Tenneco Chemicals, Inc. v. William T. Burnett & Co., Inc., 691 F.2d 658 (C.A. Md. 1982); Traders & General Ins. Co. v. Powell, 177 F.2d 660, 665 (8th Cir. 1949); Smith v. Pacific Alaska Airways, 89 F.2d 253 (Cir. Ct. App. Ak. 1937), cert. denied, 302 U.S. 700, 58 S.Ct 20, 82 L.Ed. 541 (1937); Oldow v. National Transp. Safety Bd., 792 F.2d 144 (9th Cir. 1986); Panduit Corp. v. All States Plastic Mfg Co., 744 F.2d 1564, 1579 (Fed. Cir. 1984); Prokes v. Mathews, 559 F.2d 1057, 1060 (6th Cir. 1977); Legille v. Dann, 544 F.2d 1, 8-9, (D.C. Cir. 1976). United States v. Oregon State Medical Soc., 343 U.S. 3 26, 72 S. Ct. 690, 96 L. Ed. 978 (1952); Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333, 53 S. Ct. 391, 77 L. Ed. 819 (1933); Chesapeake & O R. Co. v. Martin, 283 U.S. 209, 51 S. Ct. 453, 75 L. Ed. 983 (1931); United States v. Caldwell, 820 F.2d 1395 (5th Cir 1987); United States v. Bales, 813 F.2d 1289 (4th Cir. 1987); Carter v. Duncan-Higgins, Ltd., 727 F.2d 1225 (D.C. Cir. 1984); Petition of M/V Elaine Jones, 480 F.2d 11 (5th Cir. 1973); Patterson Oil Terminals, Inc. v. The Port Covington, 109 F. Supp. 953 (E.D. Pa. 1952), aff'd, 208 F.2d 694 (3rd Cir. 1953); Davidson Steamship Co. v. United States, 205 U.S. 187, 194 (1907); Universe Tankships v. The Munger T. Ball, 157 F. Supp. 237 (S.D. Ala. 1957); Al Johnson Construction Co. v. S.S. Rio Orinoco, 249 F. Supp. 182, 1966 A.M.C. 791 (E.D. Pa. 1965); Atlee v. Packet Company, 88 US (21 Wall.) 389, 390, 22 L.Ed. 619 (1874); The Manhattan, 3 F. Supp. 75 (EDPA 1932); Transorient Navigators Company S/A v. M/S Southwind, et al, 524 F. Supp. 373 (EDLA 1981); Seaboard Airline R. Co. v. Pan American Petroleum & Transport Co. (The Pan Maryland), 199 F.2d 761, 1952 A.M.C. 1934 (5th Cir. 1952).; Woods v. United States, 681 F.2d 988 (5th Cir. 1982); Brown and Root Operators, Inc. v. Zapata Off-shore Co., 377 F.2d 724, 726 (5th Cir. 1967); Tingley v. United States, 688 F.2d 848 (9th Cir. 1982).

Statutes Cited: None

Regulations Cited: 46 CFR 5.705(a)

II

Appellant contends that the Coast Guard failed to carry its burden of proof because he rebutted the presumption of negligence that arose from the grounding by the testimony of Captain Chapman that the grounding was unavoidable due to unpredictable sheer. I do not agree.

The grounding of a vessel on a marked shoal or where a vessel has no business being raises a presumption of negligence on the part of the person directing the navigation of the vessel. Appeal Decision 2382 (NILSEN), aff'd. sub nom. Commandant v. Nilsen, NTSB Order No. EM-126. The flotilla in this case needed to stay in the channel because of its draft. (Transcript at pp. 41-42). The flotilla's draft was about 32 feet at the time of the grounding. (Transcript at p. 41). The depth of the channel from Cut "G" into Cut "J" where the flotilla grounded was about 34 feet. (Transcript at p. 42; I.O.'s Exhibit 12). The depth of the surrounding water of Tampa Bay adjacent to the channel where the grounding took place was about 14 feet as published on the official chart of the area. (I.O.'s Exhibit 12). From prior experience, Appellant was aware that the draft of the flotilla confined its navigation to the marked, dredged channels of Tampa Bay. (Transcript at pp. 32-33). Since the flotilla grounded outside the channel, the presumption of negligence on the part of Appellant arose. (Transcript at p. 48). See Woods v. United States, 681 F.2d 988 (5th Cir. 1982).

The reasoning and policy underlying this presumption is clear. Vessels under careful and prudent navigation do not run aground in the ordinary course of things. Appeal Decisions 2173 (PIERCE), aff'd. sub nom., Commandant v. Pierce, NTSB Order No. EM-81; and Appeal Decision 1891 (BLANK). In addition, any evidence of actual negligence, or the lack of it, is likely to be known only to the persons on board, who are in the best position to either keep damaging evidence hidden, or bring favorable evidence forward.

The presumption of negligence is strong; in order to successfully rebut the presumption, Appellant was required to show that he did all that reasonable care and skill requires of a ship's pilot. Appeal Decisions 2404 (McALLISTER), aff'd. sub nom., Commandant v. McAllister, NTSB Order No. EM-131; Appeal Decisions 2173

(PIERCE), aff'd. sub nom., Commandant v. Pierce, NTSB Order No. EM-81; 2174 (TINGLEY), aff'd. sub nom., Commandant v. Tingley, NTSB Order No. EM-86, aff'd. mem. sub nom., Tingley v. United States, 688 F.2d 848 (9th Cir. 1982). The burden is upon the Appellant to disprove fault to rebut the presumption of negligence in suspension and revocation proceedings according to the Fifth Circuit holding in Woods v. United States, 681 F.2d 988 (5th Cir. 1982). Speculative possibilities are not sufficient to rebut the presumption. TINGLEY, supra.

Appellant contends that he rebutted the prsumption of negligence by introducing evidence that a sheer occurred. This does not excuse Appellant, however, as "[t]he mere fact that a sheer occurred does not excuse a navigator unless he can show that it occurred without any fault or negligence on his own part . . .." Seaboard Airline R. Co. v. Pan American Petroleum & Transport Co. (The Pan Maryland), 199 F.2d 761, 1952 A.M.C. 1934 (5th Cir. 1952). The cause of the sheer in this case was claimed to be bank or bottom suction1 resulting from maneuvering a deep-draft vessel in a narrow channel. (Transcript at p. 52). However, a pilot is expected to know channel conditions and be prepared to avoid or compensate for bank suction and resulting sheer. Al Johnson Construction Co. v. S.S. Rio Orinoco, 249 F. Supp. 182, 1966 A.M.C. 791 (E.D. Pa. 1965). A pilot is held to a very high standard of care. See Woods v. United States, 681 F.2d 988 (5th Cir. 1982). He is expected to know the channel conditions, tides, currents, and hazards to navigation of the waters in which he is licensed as a pilot, as well as the physical and handling characteristics of the vessel he is piloting. Appeal Decisions 2370 (LEWIS), 2367 (SPENCER), 2284 (BRAHN), and 995 (SAUNDERS).

1 "A ship will be set off the nearer bank when proceeding along a straight, narrow channel, especially if the draft of the ship is nearly equal to the depth of the water. This effect is particularly noticeable in narrow reaches with steep banks such as certain sections of the Panama Canal and is called bank cushion. As the ship moves ahead, the wedge of water between the bow and the nearer bank builds up higher than that onthe other side, and the bow is forced out sharply. The suction of the screw, especially with a twin-screw ship, and the unbalanced pressure of water on the [ship's] quarter lower the level of the water between the [ship's] quarter and the near bank and force the stern toward the bank. This is called bank suction. The combined effect of bank cushion and bank suction may cause the ship to take a sudden and decided sheer toward the opposite bank. [These

factors will] affect a ship trying to turn in a sharp bend in a narrow channel. Both are strong when the bank of the channel is steep[.]" A. M. Knight, Modern Seamanship, pp. 197-199, (14th ed. 1966.)

Faced with the presumption of negligence, Appellant must show that he acted reasonably under the circumstances in order to successfully rebut the presumption. Commandant v. Murphy, NTSB Order EM-139 (1987); Commandant v. Dougherty, NTSB Order EM-140 (1987). The Appellant has asserted that either unavoidable, unpredictable sheer or, perhaps, helmsman error caused this allision. The allegation of sheer does not save the Appellant. The very nature of Appellant's duties as a pilot is to recognize, anticipate and avoid the inherent, unique obstacles of the area for which he is experienced. Appeal Decision 456 (SEARS); Appeal Decision 2116 (BAGGETT); Appeal Decision 807 (DOEPFNER). The Appellant has been sailing the waters of Tampa Bay for seventeen years on all types of vessels, including those having similar maneuvering and draft restrictions to that of the flotilla in question. (Appellant's Brief at p.2). A sheer of the type described by Captain Chapman is a natural, foreseeable encounter whenever the draft of a vessel approaches the depth of the types of channels found in Tampa Bay. (Transcript pp. 52, 53). Appellant's direct examination of LCDR Guyer indicates that Appellant knew what a sheer was and the consequences that could result from it. (Transcript at p. 64). The issue with regard to the presumption of negligence in this case is the foreseeability of the sheer as a result of bank suction, not the predictability of when it may occur. Appellant, based on his experience in Tampa Bay with deep draft vessels, and his discussion with Captain Chapman concerning the tide, current and weather conditions, should have foreseen that a sheer was possible at some point in the transit of Tampa Bay. Appellant has offered no evidence of any actions he took to reasonably anticipate the sheer, or what actions he took to counter its effects by way of either direct or cross examination of the only witness, Captain Chapman. Appeal Decision 449 (HITCHENS), Appeal Decision 448 (SILL). The proper weight to be given Captain Chapman's testimony in light of his bias and self-interest as master and helmsman of the flotilla at the time of the grounding is solely the province of the Administrative Law Judge. See United States v. Oregon State Medical Soc., 343 U.S. 326, 72 S. Ct. 690, 96 L. Ed. 978 (1952); Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333, 53 S. Ct. 391, 77 L. Ed. 819 (1933); Chesapeake & O R. Co. v. Martin, 283 U.S. 209, 51 S. Ct. 453, 75 L. Ed. 983 (1931); United States v. Caldwell, 820 F.2d 1395 (5th Cir 1987); United States v. Bales, 813 F.2d 1289 (4th Cir. 1987); Carter v. Duncan-Higgins, Ltd., 727 F.2d 1225 (D.C. Cir. 1984).

Cf. Charles A. Grahn, Respondent, 3 N.T.S.B. 214 (Order EA-76, 1977); Appeal Decisions 2424 (CAVANAUGH), 2386 (LOUVIERE), 2340 (JAFFEE), 2333 (AYALA), 2302 (FRAPPIER), 2183 (FAIRALL), aff'd sub nom Hayes v. Fairall, N.T.S.B. Order o. EM-89 (1981), and 2116 (BAGGETT). Appellant did not elect to call any other expert witnesses with regard to the characteristics of the waters and channels of Tampa Bay. Furthermore, Appellant elected, as is his right, not to testify. Appellant asserts that the grounding was unavoidable. There is no evidence to support this in the record, especially in the testimony of Captain Chapman. The record is very clear that Appellant took no action whatsoever to avoid the grounding because Appellant allowed Captain Chapman to make all the critical decisions about the course and speed of the flotilla (Transcript at pp. 46, 48-50, 58, 59), and when and where to use the tugs (Transcript at pp. 45, 50, 51).

Appellant discussed the tide conditions, the weather conditions and the current situation in Tampa Bay, while the flotilla was still at anchor, with Captain Chapman. (Transcript at p. 37). Appellant chose to bring the flotilla into Tampa Bay with an ebbing current and a falling tide. (Transcript at pp. 37, 38 45). Appellant knew he had to negotiate a 90 degree turn with a one knot ebbing current at low tide pushing toward the edge of the channel on which he eventually grounded. (Transcript at pp. 37, 38, 45, 61; I.O.'s Exhibit 12). Following the grounding the flotilla returned to the anchorage, eventually completing its journey on the next flooding tide without incident. (Transcript at pp. 50-52).

Appellant had the benefit of having two tugs running alongside, but not made up, which were immediately available to him for assistance. Appellant did not make any use of the tugs in anticipation of the 90 dgree turn. (Transcript at p. 50). It was Captain Chapman who ordered a tug, the TAMPA, to push against the port bow after he began to experience some difficulty in making the turn into Cut "J". Captain Chapman testified that the tug completed his order before the grounding occurred. (Transcript at p. 46, 51). However, the Captain of the TAMPA indicated that at the time of the grounding he had resumed standing off the flotilla, running alongside. (I.O. Exhibit 4). Neither Appellant nor Captain Chapman explain why the TAMPA was not kept at the port bow forcing the bow back into the channel.

Appellant raises on appeal the possibility of helmsman's error. No evidence was introduced at the hearing to show that the actions of the helmsman caused the allision. Even assuming helmsman's error,

Appellant, as the pilot, is responsible for the actions of those under his command. Appeal Decision 456 (SEARS). Appellant, himself, on direct examination of Captain Chapman, indicated that it was his normal practice as pilot, when working with Captain Chapman on the helm to allow Captain Chapman to make his own course and speed changes, reserving the ability to overrule a decision by Captain Chapman. (Transcript at pp. 58-59). This clearly places Appellant in an awkward position of allowing someone with less experience and local knowledge to make critical decisions in confined areas of Tampa Bay. Appellant admits that prior to making the turn into Cut "J" that resulted in the grounding, his normal practice prevented him from giving an order to Captain Chapman, who had already increased speed and put his rudder over hard right to make what he felt was the proper combination of his throttle and rudder to successfully complete the urn. (Transcript at p. 58, 59). Under these circumstances, it was negligent of Appellant to delegate the control of the vessel to Captain Chapman. This evidence is independent of the reliance on the presumption of negligence. With specific regard to the presumption, Appellant has failed to meet the reasonableness test of Murphy and Dougherty, supra.

The Administrative Law Judge may draw all proper inferences from the fact that the barge grounded outside the channel. Appeal Decision 2307 (GABOURY); Appeal Decision 2116 (BAGGETT); Appeal Decision 1022 (JANSSENS); Appeal Decision 698 (LEMOINE); Appeal Decision 394 (GALVAN). See Cleary, McCormick's Handbook of the Law of Evidence, 342, (2nd Ed., 1972). He concluded that Appellant was negligent in the direction and control of the flotilla. The question of what weight is to be accorded to the evidence presented is for the Administrative Law Judge to determine. Appeal Decision 2398 (BRAZELL); Appeal Decision 2395 (LAMBERT); Appeal Decision 2386 (LOUVIERE); Appeal Decision 2282 (LITTLEFIELD). I will not reverse the conclusions of the Administrative Law Judge unless they are without support in the record, and inherently incredible, and I do not find so. Appeal Decisions 2424 (CAVANAUGH), 2423 (WESSELS), 2422 (GIBBONS), 2414 (HOLLOWELL), 2116 (BAGGETT).

III

Appellant contends that the order imposed by the Administrative Law Judge was unduly severe. I do not agree.

The order imposed upon finding a charge proved is solely within the discretion of the Administrative Law Judge, and should not be disturbed on appeal unless shown to be clearly excessive or an abuse

of discretion. Appeal Decisions 2414 (HOLLOWELL), 2391 (STUMES), and 2313 (STAPLES). The order imposed by the Administrative Law Judge in this case is not clearly excessive or an abuse of discretion.

However, as discussed in section I of this opinion, it was error for the Administrative Law Judge to vacate the probation upon which two months of suspension had previously been ordered. For that reason, the order will be modified under my authority to modify orders on appeal. See 46 CFR 5.705(a).

I note that Appellant surrendered his license to begin serving the period of outright suspension ordered in this case on 13 February 1987. I issued an order granting Appellant a temporary license while this appeal was pending on 12 May 1987, therefore approximately three months of outright suspension have already been served. I also note that this incident was one of three in approximately five years in which vessels on which Appellant was serving as pilot ran aground.

***** END OF DECISION NO. 2465 *****